

Testimony of Kathy Bates
before the
Subcommittee on Immigration, Border Security and Claims
Committee on the Judiciary
U.S. House of Representatives
“The Energy Employees Occupational Illness Compensation Program Act – Are We
Fulfilling The Promise We Made to These Veterans of the Cold War When We
Created the Program?”

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Kathy Bates
1023 Glensprings Drive
Knoxville, Tennessee 37922
865-531-0885
kathy.bates@webtechteam.com

I would like to thank Chairman Hostettler, the Honorable Sheila Jackson-Lee, and members of the subcommittee for permitting me to testify here today. My name is Kathy Bates and I am representing my mother Mildred Gore, my brothers James and Gregory Gore, and myself with respect to our EEOICPA claim under Subtitle B for my father, James Gore. My father worked as a production engineer at the Y-12 facility in Oak Ridge, Tennessee from August 1968 to October 1994. He was diagnosed with a basil cell carcinoma (BCC) on his face in July 1992. He was diagnosed with ocular melanoma in July 1997, and died in April 2001 from the melanoma which had metastasized to the liver.

As claimants, we are the direct recipients of the output of the EEOICPA program. My testimony today is intended to communicate our frustration with this process and the serious issues with the claims process that we believe, through personal experience, appear to be prevalent. I would also like to comment on the bill Representative Jackson-Lee has introduced, the Energy Employees Occupational Illness Compensation Improvement Act of 2006.

Through hundreds of hours of personal research, I have educated myself on the EEOICPA program and the 42 Code of Federal Regulations (CFR) Part 82 and 42 CFR Part 81 documents that govern the program and its processes. I have read thousands of pages of technical documents, reports, presentations, meeting proceedings, public comment, and testimony from this subcommittee. To the extent that I understand the program and the process created to develop dose reconstructions for claimants, I must say that it is overwhelming. To the average person, I would conclude that it is incomprehensible.

Recently, the focus of this subcommittee appears to be on a variety of very critical issues related to the EEOICPA program, including: the OMB pass back memo which apparently recommends reduction in benefits to claimants associated with Special Exposure Cohort (SEC) classes, changes in the Advisory Board members, perceived issues with respect to the Advisory Board's auditing consultant, Sanford, Cohen and Associates (SC&A), and resolution of conflict of interest

issues across all parties, amongst others. We ask you to consider adding quality control with respect to the claims process to your list of concerns.

We have grave concerns regarding the apparent lack of quality control and assurance that is applied to the processing of claims. Specifically, given our particular case, we have to wonder if there is any quality control at all. In this written statement submitted for the record, I have outlined the problems and errors that occurred with our claim.

My mother filed a claim for my father in January 2003. On or about July 1, 2005, she received the NIOSH Draft Dose Reconstruction. The fact that this report was not for my father – but for a security guard in Paducah, KY – was the first red flag. My mother immediately contacted the NIOSH case worker via telephone and informed him that she had received the wrong report. The case worker told her to “throw away” the incorrect report and that the correct report would be sent in the mail. Within a short time after receiving the incorrect report, a case worker called my mother to conduct the closing interview. Even though she stated she did not have the Draft Dose Reconstruction for James Gore, the interviewer continued with the closing interview. This is in clear violation of 42 CFR 82.10(I).

On July 29, she did receive a Draft Dose Reconstruction from NIOSH for James Gore. She also received a follow-up telephone call from a NIOSH case worker to verify that she had in fact received the Draft Dose Reconstruction Report. During this call, her comment was “I can’t understand how he worked there for 26 years, wore a dosimetry badge every day, and there are no records.” The NIOSH case work answered, in essence, “that happens.”

The Draft Dose Reconstruction Report did not contain or reference all of the information she had provided via telephone communications with NIOSH, including the initial telephone interview which occurred on December 4, 2003. There is no evidence in the Draft Dose Reconstruction Report that NIOSH made any attempt, as described in various sections of 42 CFR 82, to develop a reasonable estimate of Mr. Gore’s potential radiation dose in the event that records may be missing or inadequate or to initiated an SEC petition under Section 83.14..

- NIOSH states that DOE did not provide any records of external monitoring. NIOSH did not accept my mother’s information that my father routinely wore a dosimetry badge, yet considered him an “unmonitored” (and minimally exposed) employee as the basis of the dose reconstruction.
- It is not apparent that NIOSH received any information from any source other than me regarding his job history with respect to positions he may have held over his 26 year career at Y-12. NIOSH did accept my mother’s information that my father was a “weapons production supervisor” and assumed, apparently, that this was his position for his entire 26 year career even though information was provided that he held at least one other position towards the end of his career by her in the initial telephone interview.
- NIOSH stated that “*Mr. Gore’s work location is unknown.*” It is not apparent that NIOSH received any information from any other source regarding his job history with respect to work location(s) including site names(s), building numbers(s), technical area(s), and duration of relevant employment or tasks for any period of his employment.

- There is no indication in the Draft Dose Reconstruction Report that my mother provided the name of at least one co-worker, his supervisor, Mr. K. O. Pearson. There is no evidence in the Draft Dose Reconstruction Report that NIOSH made any attempt to contact this individual to confirm or refute her information or to even to provide supplemental information regarding Mr. Gore's employment history. Unfortunately, Mr. Pearson died in 2005.
- There is no indication in the Draft Dose Reconstruction Report that she provided any information regarding biological radiation-monitoring programs that Mr. Gore may have participated in during his years of employment. While she did initially answer "no" to this question during the initial telephone interview, she subsequently called NIOSH to inform them that Mr. Gore was subjected to at least one a 24-hour urinalysis test sometime in the mid to late 1970's that she could recall. Since a 24-hour urinalysis is something that would have had a portion of it conducted at home, she did observe this event.

In the original Draft Dose Reconstruction from NIOSH dated July 29, 2005, it was stated:

- *"Records received from the Department of Energy were reviewed, and it was indicated that **Mr. Gore was not monitored for radiation exposure.**"*
- *"**Since no monitoring records were available**, the maximum 50th percentile dose for each given year of employment from Oak Ridge National Laboratory, Oak Ridge Gaseous Diffusion Plant, Hanford Site, Paducah Gaseous Diffusion Plant, Savannah River Site, and Portsmouth Gaseous Diffusion Plant **was assigned as an unmonitored dose for Mr. Gore.**"*
- *"The record of the telephone interview was evaluated carefully by the dose reconstructor. No radiological incidents were documented in either the telephone interview summary or the records provided by the Department of Energy. However, **the telephone interview indicated that Mr. Gore was routinely monitored**, but since no external monitoring data were present in the records supplied by the Department of Energy, complex wide co-worker dose was assigned."*
- *"The majority of Mr. Gore's radiation exposure was received during employment as a weapons production supervisor according to the information provided in the interview process."*
- *"As a weapons production supervisor (engineer), **Mr. Gore's work location is not known**. In this capacity, he would have likely been exposed to photon and electron radiation, even though no monitoring records were found. However, due to the possibility of lost records or unmonitored occupational dose, external dose was assigned based on the maximum 50th percentile complex wide co-worker dose for the given years of employment. **External electron radiation was not considered in this dose reconstruction because Mr. Gore did not work directly with radioactive materials**, and any external doses would have been attributable primarily to photons. For the purposes of estimating probability of causation, all photon doses are assumed to be accurate."*

To quote the some of the applicable guidelines for dose reconstruction, in brief:

42 CFR 82.2 What are the basics of dose reconstruction? *The basic principle of dose reconstruction is to characterize the radiation environments to which workers were exposed and to then place each worker in time and space within this exposure environment. Then methods are applied to translate exposure to radiation into quantified radiation doses at the specific organs or*

tissues relevant to the types of cancer occurring among the workers. A hierarchy of methods is used in a dose reconstruction, depending on the nature of the exposure conditions and the type, quality, and completeness of data available to characterize the environment. (a) If found to be complete and adequate, individual worker monitoring data, such as dosimeter readings and bioassay sample results, are given the highest priority in assessing exposure. These monitoring data are interpreted using additional data characterizing the workplace radiation exposures. If radiation exposures in the workplace environment cannot be fully characterized based on available data, default values based on reasonable and scientific assumptions may be used as substitutes. For dose reconstructions conducted in occupational illness compensation programs, this practice may include use of assumptions that represent the worst case conditions. For example, if the solubility classification of an inhaled material can not be determined, the dose reconstruction would use the classification that results in the largest dose to the organ or tissue relevant to the cancer and that is possible given existing knowledge of the material and process. **(b) If individual monitoring data are not available or adequate, dose reconstructions may use monitoring results for groups of workers with comparable activities and relationships to the radiation environment.** Alternatively, workplace area monitoring data may be used to estimate the dose. As with individual worker monitoring data, workplace exposure characteristics are used in combination with workplace monitoring data to estimate dose. **(c) If neither adequate worker nor workplace monitoring data are available, the dose reconstruction may rely substantially on process description information to analytically develop an exposure model.** For internal exposures, this model includes such factors as the quantity and composition of the radioactive substance (the source term), the chemical form, particle size distribution, the level of containment, and the likelihood of dispersion.

In addition to (1) no evidence of external monitoring records, (2) no description of job history (positions held year by year), (3) no information relating to work locations (site names(s), building numbers(s), technical area(s)), and (4) no information relating to duration of relevant employment or tasks for any period of Mr. Gore's employment, NIOSH also apparently did not have any other type of information that is considered to be relevant to the dose reconstruction. Specifically, NIOSH states that there were no records of bioassay results. They also imply that they have no "medical" records for Mr. Gore that may have been available from routine visits to the Y-12 infirmary for events like his annual physical which may have included X-rays.

How was NIOSH able to establish a Draft Dose Reconstruction for my father if they did not even have the most basic information such as job title and work locations? Why was he "just assigned" to the "50th percentile complex wide co-worker dose" as an "unmonitored employee" if in fact enough information did not exist to perform a "reasonable" dose reconstruction? What information existed...nothing more than the fact that he worked at Y-12?

Even though all of these questions were asked in the appeal, they have **never** been addressed with us the claimants, either verbally or in writing, by NIOSH, ORAU, or DOL

We received the DOL Recommended Decision dated November 17, 2005 which, in addition to repeating the same statements from the Draft Dose Reconstruction, concluded with:

"A copy of the case file along with a National Institute for Occupational Safety and Health (NIOSH) Referral Summary was forwarded to NIOSH for dose reconstruction on April 17,

2003. On October 7, 2005, the district office received the "NIOSH Report of Dose Reconstruction under EEOICPA" dated July 28, 2005 which provided the estimate of dose to the primary right eye site. NIOSH estimated the annual dose totaling 18.842 rem to Mr. Gore. Based on this dose estimate, the calculation of probability of causation was completed using NIOSH-IREP, which is an interactive software program. **The probability of causation for the primary colon cancer was determined to be 25.40%."**

My father did not have colon cancer nor was he ever diagnosed with colon cancer. This is a completely unacceptable error. This type of error causes grave concern regarding the quality control and quality assurance associated with this process.

We subsequently filed an appeal to the Recommended Decision with DOL on January 10, 2006, outlining, as required, "...the specific finding of fact or conclusion of law with which you agree, including any objective to any dose reconstruction performed." In our appeal, to the best of my ability, I outlined the specific findings with respect to CFR 42 Part 82 and CFR 42 Part 81 as appropriate.

On that same day, I filed a request under the Freedom of Information Act (FOIA) through the U.S. Department of Energy, Oak Ridge Operations, to disclose to me all records available pertaining to James Z. Gore's employment history including medical, personnel, radiation exposure, and industrial hygiene. I also submitted a request under the Freedom of Information Act (FOIA) to Larry J. Elliott, MSPH, CIH, Director, Office of Compensation Analysis and Support, to disclose to me all administrative records pertaining to EEOICPA Claim #12438 for James Z. Gore.

In the meantime, I started searching the internet for any type of advocacy groups for EEOICPA claimants. After much fruitless searching, I resorted to reading the public comment that had been posted *prior* to the final guidance of CFR 42 Part 82 and CFR 42 Part 81. By searching the internet for e-mail addresses of people who had provided public commentary, I sent a number of e-mails to these individuals in hopes of a response regarding guidance on what to do next. I did receive a response that directed me to Richard Miller, who is a Senior Policy Advisor for the Government Accountability Project (GAP). While I do not think it is Richard's job to be an advocate for EEOICPA claimants, he graciously took the time to talk to me and tell me about various opportunities for escalation, including the public sessions held by the Advisory Board. Until I talked to Richard, I had no idea that any of this existed.

I then spoke at the Advisory Board public session held in Oak Ridge, TN on January 23, 2006. My mother and I were outraged and appalled at the apparent level of carelessness that seemed to be prevalent in this entire process, from start to finish, and I hoped that my testimony would at least create some level of visibility to these problems. At this session, I basically outlined our issues with the process and the denial of the claim. Amazingly, when I was preparing for this session, I happened to notice that the "file number" is supposed to be my father's social security number. In the NIOSH correspondence, I had assumed that it was correct, and so I assumed that it was incorrect on the DOL Recommended Decision. I posed a question as to the significance of this as part of my public session statement.

At that meeting, we were pleased to meet senior administrators from DOL, NIOSH, and ORAU. They were most sincere in their apologies with respect to how this could have happened, and we

had their *personal assurances* that these problems would be addressed and corrected. This level of attention certainly exceeded our expectations.

After the Advisory Board meeting, I had several e-mail correspondences with senior administrative officials from NIOSH. On 2/1/06, I sent an e-mail to NIOSH stating that the wrong SSN was on NIOSH's documentation. I received assurances that the SSN would be corrected. When I received the administrative records from NIOSH for my father's claim, I could see that in fact, they did have the correct SSN on a variety of documents, but at some point in time, a "3" had turned into an "8." Two records requests were submitted to DOE by NIOSH on 5/29/03 and 11/28/04 with the **wrong** SSN. As a result, DOE returned "no records" for my father. Further research based upon the administrative records I received from NIOSH via the FOIA request indicated that the Social Security number was correct on numerous documents in NIOSH's possession.

So my basic question is – if something as important as the SSN is the major key in retrieving records for any DOE employee – what are the quality controls and checks in place to ensure that this vital piece of information is correct?

In the interim, all of the correspondence between me and/or my mother was initiated by us, either via e-mail or phone calls. I did receive at least one phone call from NIOSH and one phone call from DOL as a "return call" to my inquiries. Other than that, we had no idea what the status of our claim was. In particular, the common answer from the DOL office in Jacksonville when I would call was that "it is going through the process." All of my e-mails to NIOSH were answered promptly, within 24 hours. However, until DOL returned the claim to NIOSH, there was not much NIOSH could do in terms of providing a status.

A letter from DOL dated June 8, 2006, stated that the appeal was approved, but the basis for the return of the claim to NIOSH was the fact that we had indicated my father was diagnosed with a basal cell carcinoma (which was not included as part of the first claim, mainly through our initial ignorance of the process), not the result of the errors that created the first incorrect dose reconstruction. As part of the appeal process, we had included the information that my father had been diagnosed with BCC, and we subsequently obtained the medical records related to this diagnosis and submitted them to DOL as per their request.

Regardless, we were pleased that the appeal was approved. Since at this time, the issue of the incorrect Social Security number for the DOE records search was known, at least to NIOSH, we had some degree of confidence that we would eventually receive a proper dose reconstruction. I did in fact receive a copy of my father's records that I had requested via a Freedom of Information Act request to DOE on 5/16/06, so, records did in fact exist. *"Enclosed are copies of Mr. Gore's medical records, chest x-rays, personnel records, **radiation exposure records** and personnel security file..."* I subsequently received his chest x-rays (films) from DOE and other records from the U.S. Office of Personnel Management Center for Federal Investigation Services.

I finally received an affirmative response from NIOSH on 8/21/06 in response to my e-mail inquiry if NIOSH had received the claim from DOL.

Subsequently, I spoke directly to a Claimant Contact at NIOSH on August 22, 2006, and verified that the DOE records included Radiation Exposure Records for my father, at least for dosimetry badge readings from 1968 through 1988. The Claimant Contact indicated that NIOSH had "not yet" received records from DOE and she asked me if I would mind sending her a copy of the Radiation Exposure Records. I immediately scanned and e-mailed all of the pages for these records to her, and she acknowledged the receipt of the files and indicated that she would forward to the appropriate parties as well as place this information in the administrative record. Again, I felt some degree of confidence that the process was working.

On November 2, 2006, I received the second Draft Dose Reconstruction from NIOSH. I had to read no further than page 5 to see that **the problem had not been resolved.**

Aside from my initial shock, I was even more confused. The Draft Dose Reconstruction dated October 27, 2006 (received November 2, 2006) stated that (quote) "**Records received from the Department of Energy were reviewed, and it was indicated that Mr. Gore was not monitored for radiation exposure.**" (end quote) Further on the same page, the report stated (quote) "**Since no monitoring records were available for Mr. Gore, the maximum 50th percentile doses for each given year of employment from ... (and it lists all the sites)... was assigned as an unmonitored dose for Mr. Gore in accordance with guidance....**" (end quote) And further, on the same page, the report stated (quote) "**As an engineer and weapons production supervisor (engineer), Mr. Gore's work location is not known.**" (end quote)

My mother and I were stunned. This is the exact same wording from the original Draft Dose Reconstruction received July 29, 2005. To quote my mother: "it's as if your father never existed." Interestingly enough, the SSN on the fourth page, which is the cover page for the Draft Dose Reconstruction, is correct.

Not only did I personally have a copy of my father's DOE records, I had sent the Radiation Exposure Records directly to NIOSH. And, if you slog through all of the records, you can certainly find instances of my father's job title, job description, and building location over the years of his employment on various documents. So if you had the records and you actually went through them carefully, you could build a small history of his employment with respect to what job duties he may have performed based on his job title, the department he worked under, and the buildings where he worked.

Just from the medical records (appear to be routine visits to the Y-12 plant physician), I am able to discern, to some degree, his **job** locations and even his job titles over the years. For example:

- **7-19-78** Plant address = 9212 MS 1, supervisor = K. O. Pearson, job title = production engineer, division = Fabrication
- **11-11-76** Plant address = 9212, RM 54, supervisor = K. O. Pearson, job title = engineer III, division = Fabrication
- **11-22-74** = Plant address = 9212, supervisor = K. O. Pearson, job title = production engineer, division = Fabrication
- His starting position based upon his employment application in 1968 was "engineer."

I was able to develop this very crude type of job history through 1993.

That evening (11/2/06), I sent an e-mail that evening to two senior administrators at NIOSH and ORAU outlining the issues with the second dose reconstruction. I did receive phone calls from both NIOSH and ORAU early in the morning of November 3, 2006. At this time, I learned that, once again, it appeared that the NIOSH records request to DOE had been submitted with the wrong social security number. I assume, and have yet to verify, that NIOSH is going to immediately address this problem and start on the dose reconstruction for the *third time*. We are entering our *fifth year* of this process in January.

How could this have happened? I would have assumed that at a minimum, with the level of visibility we had received from senior administrators within NIOSH, ORAU, and DOL, that these problems would have resulted in corrective actions to ensure such errors could not occur again. The fact that they occurred again – on our specific claim given the level of visibility it had – is both outrageous and appalling.

Even if a dose reconstruction is completed for my father using the records that are available, I have to honestly say, at this point, that we have little or no faith in the validity of the results. Our case is, in my opinion, a stunning example of very significant errors that should have been identified and corrected prior to us ever receiving the output of the process – on both occasions to date.

We can only wonder how many claims have been processed with the same level of apparent negligence which may have resulted in a denial of the claim. How many claimants actually have the wherewithal to even be able to understand the Draft Dose Reconstruction or the Final Recommendation, much less understand enough to see that it may be wrong? My mother said to me, “if you had not read these documents and realized that they were wrong, I would have just tossed them in the garbage and been done with it.” My mother is not an uneducated woman. She had a very successful career in the medical profession as both a nurse and administrator. If you have never actually seen or read one of these reports, I encourage you to do so, and try to imagine yourself as a claimant.

Our fundamental question is: is our claim experience an aberration, or are there real and systemic problems associated with the EEIOCPA claims process that could have resulted in the denial of other claims?

We hope this subcommittee will continue to work together to pass Representative Jackson-Lee's bill. In this context, we have several recommendations which reflect our opinion. While I cannot speak to all of the sections of the bill, there are several that we feel are of great importance to all claimants.

1. I urge you to support the extension of responsibilities for the DOL's Office of the Ombudsman to include Subtitle B, and expand its responsibilities to act as an advocate on behalf of claimants seeking benefits. From direct personal experience, I can assure you that this is an overwhelming and in some aspects, incomprehensible process. I would assume that many people just “give up” because they have no idea what to do or where to go for help. How many Denise Brock's are out there, taking up this cause and

dedicating enormous personal resources to help claimants? Establishing the Ombudsman for Subtitle B claimants would be a most welcome resource in support of the program.

2. The Special Exposure Cohort provision should be modified to facilitate entry into the SEC when records are missing or non-existent. There is extensive documentation that has been generated on the technical difficulties in recreating dose reconstructions for workers who were employed up to 60 years ago and as recent as 30 years ago and the fact that many records are missing or incomplete. For many claimants, the SEC process may be the only hope they have of receiving a fair assessment.
3. Our perception of the Advisory Board and its consultant is that it performs a critical function with respect to checks and balances. This is an incredibly complex process – both scientifically and administratively – and what we have seen (and read) of this Board is that they are trying to the best of their ability to ensure the integrity of the EEOICPA program in a variety of areas. The Board must be a neutral party and not be biased towards any agency or party involved in this process. To the extent that the reforms will enable the Advisory Board to successfully fulfill the intent of its mission, we encourage you to provide your support.
4. I would recommend that the role of the Advisory Board should extend to the execution of claims process itself. At present, it does not appear that there is an external organization not affiliated with the EEOICPA program that is responsible for overall administrative and claimant process audits. If appropriate, SC&A's responsibilities should be extended to this area. If not, the addition of a third-party auditor for this purpose should be considered.

I hope that my testimony today will be of value. We mourn the loss of my father every day. We were blessed to have such an extraordinary man as our father. We are proud of his service to our country as a U.S. Navy veteran and of his service, however small, in ensuring the safety and security of the United States of America as a DOE employee for so many years. On behalf of my family and myself, I thank you again for your efforts to support key improvements in this program and for allowing me to testify here today.